Mary Colete John v South East Asia Insurance Bhd

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 23–62 OF 1999
JEFFREY TAN J
17 SEPTEMBER 2004

Road Traffic — Insurance — Liability of insurers to satisfy judgment obtained by passenger against insured — Road Transport Act 1987, s 91(1)(bb) — Whether exception applicable — Relationship between insured and passenger — Whether passenger was an independent contractor

The plaintiff was engaged by the 1st judgment debtor (JD) to make up a bride in Kluang, Johor. It was agreed that she would be paid RM100 and transport would be provided for her to travel to Kluang. Whilst travelling in a car owned by the 1st JD as a passenger, she met with an accident and suffered serious injury. As the car was insured by the defendant, the plaintiff gave the defendant, a notice under s 96(2) Road Transport Act 1987 ('RTA') and brought an action against the 1st JD. After full hearing, the court held the 1st JD liable. However, the defendant refused to pay damages and costs on the ground that the insurance policy did not cover passenger liability. The plaintiff then filed an application to compel the defendant to satisfy the judgment obtained against the 1st JD. The issue raised was whether the plaintiff at the material time was carried in the insured vehicle by reason of a contract of employment or in pursuance of a contract of employment. The counsel for the plaintiff argued that as the accident occurred on the plaintiff's way to make up the bride, it falls within the ambit of s 91(1)(bb) RTA.

Held, dismissing the plaintiff's claim:

(1) On the facts, the plaintiff was plainly an independent contractor. She was self-employed. The contract between her and the 1st JD was a contract for service (see para 30).

(2) The plaintiff was not carried in the vehicle by reason of or in pursuance of a contract of employment. She was not an employee of anyone, and thus, she could not have been carried by reason of or in pursuance of a contract of employment (see para 30).

[Bahasa Malaysia summary

Plaintif diupah oleh penghutang penghakiman (PP) untuk mengandam pengantin di Kluang, Johor. Ianya telah dipersetujui bahawa beliau akan dibayar upah sebanyak RM100 dan kenderaan akan disediakan bagi membolehkan beliau pergi ke Kluang. Semasa menaiki kereta yang dimiliki oleh PP sebagai penumpang, beliau menemui kemalangan dan mendapat kecederaan yang serius. Oleh kerana kereta tersebut diinsured oleh defendan, plaintif memberi defendan satu notis di bawah s 96(2) Akta Pengangkutan Jalan 1987 ('APJ') dan memulakan tindakan terhadap PP. Selepas bicara penuh, mahkamah memutuskan PP bertanggungjawab. Tetapi, defendan enggan membayar ganti rugi dan kos atas alasan bahawa

polisi insurans tersebut tidak merangkumi liabiliti penumpang. Plaintif kemudiannya memfailkan satu permohonan untuk membuat memaksa defendan menunaikan penghakiman yang diperoleh terhadap PP. Isu yang dibangkitkan adalah sama ada plaintif pada masa matan dibawa di dalam kereta yang diinsured atas sebab satu kontrak pekerjaan atau kerana menjalankan kontrak pekerjaan. Peguam plaintif mengatakan bahawa oleh kerana kemalangan tersebut berlaku semasa plaintif dalam perjalanan ke tempat pengantin yang akan di andamnya, ianya termaktub di bawah s 91(1)(bb) APJ.

Diputuskan, menolak tuntutan plaintif:

(1) Pada fakta, adalah jelas plaintif seorang kontraktor bebas. Beliau bekerja sendiri. Perjanjian di antara beliau dan PP adalah perjanjian untuk perkhidmatan.

(2) Plaintif tidak dibawa di dalam kenderaan tersebut atas sebab satu kontrak pekerjaan atau kerana menjalankan pekerjaan. Beliau bukannya seorang pekerja, maka dari itu, beliau tidak boleh dibawa di dalam kenderaan tersebut atas sebab satu kontrak pekerjaan atau kerana menjalankan pekerjaan.]

Notes

For cases on liability of insurers, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 191–192

Cases referred to

Allan Bernado Castillano & Ors v Samuel Milan & Anor [1999] 8 CLJ 11 (refd)
Baker v Provident Accident and White Cross Insurance Co Ltd (1939) 2 All ER 690 (refd)
Bata Shoe (Malaya) v Employee Provident Fund Board [1967] 1 MLJ 120 (refd)
Burton & Anor v Road Transport & General Insurance Company Ltd (1939) Lloyd's Reports Vol 63-253 (refd)
Chan Kum Fook & Ors v The Welfare Insurance Co Ltd [1975] 2 MLJ 184 (refd)
China Insurance Co Ltd v Teh Lain Lee & Anor [1977] 1 MLJ 1 (refd)
Hong Liang Ting & Ors v China Insurance Co Ltd [1984] 2 MLJ 327 (refd)
Izzard v Universal Insurance Co (1937) AC 773 (refd)
Johor Granite Quarries Sdn Bhd & Anor v Seri Alam Properties Sdn Bhd [1995] MLJU 353 (refd)
Lees v Motor Insurers Bureau (1952) 2 All ER 51 (refd)
New Zealand Insurance Co Ltd v Sinnadorai [1969] 1 MLJ 183 (refd)
Richard v Cox (1942) 2 All ER 624 (refd)
Summons v Health Laundry (1910) 1 KB 543 (refd)
Tan Keng Hong v Fatimah binti Abdullah & Ors [1974] 1 MLJ 156 (refd)
Tan Keng Hong & Anor v New India Assurance Co Ltd [1978] 1 MLJ 97 (refd)
Teoh Gor Hua v Camel Plywood Corp Ltd [1968] 2 MLJ 147 (refd)
The Performing Right Society Ltd & anor v United Artists Singapore Theatres Pte Ltd [2001] 2 SLR 375 (refd)

A *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1999] 1 MLJ 593 (refd)
United Oriental Assurance Sdn Bhd v Lim Eng Yew [1991] 3 MLJ 429 (refd)
Vandyke v Fender & Anor [1970] 2 QBD 292 (refd)

Legislation referred to

B Employment Act 1955 s 2
Road Transport Act 1987 ss 91, 91(1), (1)(aa), (1)(bb), 96, (2)
Road Traffic Ordinance 1958 s 75(1)(D)(ii)

N Jegatheeson (E Ramasamy with him) (E Ramasamy & Co) for the plaintiff
C *Prakash Menon (V Nadaraja with him) (Isharidah Ho Chong & Menon) for the defendant*

Jeffrey Tan J:

[1] This is an action by the plaintiff who was seriously injured in a motor accident, to recover the judgment sum obtained in Muar High Court 23(25)–15–1990 and upheld in Court of Appeal J–02–469–1997, from the defendant who was the insurer of the first judgment debtor's motor vehicle at the material time. In short, this is an action to compel the defendant/insurer to satisfy the judgment obtained against the first judgment debtor, pursuant to s 96 of the Road Transport Act 1987, which states:

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> If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to
F this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[2] The agreed facts are as follows:

G (1) The plaintiff was a beautician and part of her job was to make-up and beautify marriage brides. Sometime in July 1985 one Angel Helen Puspam Pereira ('Angel'), engaged the plaintiff to dress, make-up and beautify the bride for a wedding taking place in a Church Kluang Town, Johore, The agreed term of the engagement was that the plaintiff (would) be paid RM100 by Angel, and that transport (would)
H also be provided by Angel to enable her to travel from her home in Seremban to Kluang, Johor and back.

(2) On 24 July 1985 the plaintiff got into car No BBU 8691 belonging to Angel, driven by her brother Edwin Nobel Pereira and was on her way from Seremban to Kluang to attend to the bride as employed by Angel.
I While on the way to the bride's home in Ladang Treh Utara, Kluang, the car skidded and overturned and the plaintiff was seriously injured suffering neck-down paralysis.

(3) The plaintiff at all material times was travelling as a passenger in motorcar No BBU 8691. A

(4) The car No BBU 8691 was at all material time insured by the defendant South East Asia Insurance Berhad as per insurance policy found in pp 2–14 of IDP.

(5) The plaintiff after giving requisite notice dated 19 October 1990 to the defendant South East Asia Insurance Berhad under s 96(2) of Road Transport Act 1987 brought an action against Angel Helen Puspam Pereira as registered owner of the car and Edwin Nobel Pereira as driver vide Muar High Civil Suit No 23(25)–15 of 1990. South East Asia Insurance Berhad were in control of conducting that trial through their Solicitors Messrs L Pereira & Associates on behalf of Angel Helen Puspam Pereira and Edwin Noble Pereira. After a full hearing the Court held Angel Helen Puspam and Edwin Noble Pereira liable and made an award as in Court Order dated 19 May 1997 IDP pp 49–52 and that the findings and the award as in pp 55–62 of IDP were confirmed by the Court of Appeal on 12 April 1999 (IDP pp 53–54). B C D

(6) The defendant South East Asia Insurance Berhad refused to pay the damages and costs awarded in Civil Suit No 23(25)–15 of 1990 on grounds that the Insurance Policy concerned does not cover passenger liability.

[3] The agreed issues are as follows: E

(1) At the material time was the plaintiff being carried in the insured's vehicle as a mere passenger or was she travelling pursuant to the agreed engagement with the insured to make up the bride for the agreed sum of RM100.

(2) If it is held that the plaintiff was not being carried as a mere passenger then, the issues are: F

   (a) was the plaintiff being carried by reason of or in pursuance of a contract of employment with the insured;

   (b) and if so are the defendants liable under the terms of the said insurance policy to satisfy the judgment sum. G

[4] But agreed issue 1, in view of the aforesaid agreed fact 1, is moot. As a matter of fact, on 24 April 2004, both counsel related that the sole issue is "whether the plaintiff was at the material time carried in the (insured) vehicle by reason of a contract of employment or in pursuance of a contract of employment". Both counsel affirmed that the answer would settle the issue of liability. H

[5] Mr N Jegatheeson with Mr E Ramasamy for the plaintiff submitted as follows. The plaintiff was lawfully in the insured vehicle as a passenger. There was a policy fulfilling the provisions of s 91 of the Road Transport Act 1987. A passenger is generally not covered, unless the passenger was being carried by reason of or in pursuance of a contract of employment. It is an agreed fact that at the material time the plaintiff was in the insured vehicle and on her way to make up the bride of the 2nd JD (the brother of the 1st JD). The situation I

falls within s 91(1)(bb) of the RTA 1987 which is in *pari materia* with s 75(l)(D)(ii) of the RTO 1958. There was a contract of employment, namely the contract to make up. The plaintiff resided in Seremban but the bride was in Kluang. It was a term of her contract that transport would be provided. A one off engagement also falls within the definition "contract of employment". The plaintiff's case is stronger than *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1999] 2 CLJ 517. So long as the injured was "employed" it is not necessary that there should be a contract of employment as between employer and employee (counsel cited *Izzard v Universal Insurance Co* (1937) AC 773, at 781 & 782, and *Burton & Anor v Road Transport & General Insurance Company Ltd* (1939) Lloyd's Reports Vol 63-253). Mr Ramasamy remarked that "as long as services were engaged, then it would fall within the definition of employer/employee"

[6] Mr Prakash Menon for the defendant submitted that the plaintiff was a passenger and the policy excluded liability to passengers. Section 91 of the RTA provides what a policy should cover. Section II of the said policy was in 2 parts. The plaintiff was not a member of the household of the insured and the 2nd limb does not concern the instant case. *Union Insurance Malaysia Sdn Bhd v Chan You Young* which concerned the 2nd limb could not apply to the instant case. It is the 1st limb to s 91(1)(bb) of the RTA 1987 that concerns the instant case. The plaintiff admitted that she was not an employee of the 1st JD, and the 1st JD confirmed that the plaintiff was not her employee. PB15 was prepared after the accident. In *Tan Keng Hong & Anor v New India Assurance Co Ltd* [1978] 1 MLJ 97, 98, the Privy Council held that the words "by reason of employment" must be read in conjunction with the words "in pursuance of". There must be an employer-employee relationship. The plaintiff was an independent contractor at best. *Hong Liang Ting & Ors v China Insurance Co Ltd* [1984] 2 MLJ 327 is similar to the instant case. In *Vandyke v Fender & Anor* [1970] 2 QBD 292, it was held that the terms of employment must oblige the employee to travel in that way. It was a contract for service and not a contract of service (counsel cited *Vandyke* at 300, 304, 305). An employer should be as defined in s 2 of the Employment Act 1955, and an employee should be as defined in the 1st Schedule to the Employment Act.

[7] Subsection (1) of s 91 of the Road Transport Act 1987 states:

> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —
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> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
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> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability.

[8] Section 91 is not exactly unintelligible, but is it not that comprehensible. While sub-s (l)(b) provides that the policy must insure "such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road", sub-ss (1)(aa) and (1)(bb) equally provide that the policy shall not be required to cover "liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment", or "except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise".

[9] Sub-sections (1)(aa) & (1)(bb) are exceptions to s 91(1). But there is more to it. Sub-section (1)(bb) is in two limbs, and the 1st first limb is an exception to the exception in sub-section (1)(bb). The net effect of it all is this. A policy under Part IV of the RTA 1987 shall be required to cover liability "in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment" [1st limb to sub-s (1)(bb)] but shall not be required to cover "liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment" [sub-s (l)(aa;]; or "liability in respect of the death of or bodily injury to persons being carried in or upon Or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise" [2nd limb to sub-s (1)(bb)]. "In plain language this means that insurance cover is compulsory in respect of (a) all third parties other than passengers carried in the insured's vehicle and (b) passengers carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance" (*New Zealand Insurance Co Ltd v Sinnadorai* [1969] 1 MLJ 183 per Ong Hock Thye CJ Malaya).

[10] The pertinent section of the instant private motor car policy stated as follows:

"Section 11 — Liability to Third Parties

1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

   (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured and excluding liability to any person being a member of the Insured household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment."

   (b) …

2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any authorised driver who is driving the Motor Vehicle provided that such Authorised Driver

   (i) shall as though he were the Insured observe and fulfil and be subject to the terms of the Policy insofar as they can apply

   (ii) is not entitled to indemnity under any other policy.

[11] The Schedule to the Policy provided that the following Endorsement should apply:

> Notwithstanding anything to the contrary contained in Section II-1 (a) of the Policy it is hereby understood and agreed that the Company shall not be liable in respect of death of or bodily injury to any person being carried in or upon or entering or getting on or to or alighting from any motor vehicle in respect of which indemnity is provided under this Policy at the time of occurrence of the event out of which the claim arises.

[12] Section 11.l(a) of the said policy could do with a punctuation mark. Be that as it may, it remains that s 91(1) provides that a policy under Part IV shall be required to cover liability "in the case of a motor vehicle in which passengers are carried … by reason of or in pursuance of a contract of employment", and no policy under Part IV can contract out of that statutory provision. Hence, the said Policy must have covered liability "In the case of a motor vehicle in which passengers are carried … by reason of or in pursuance of a contract of employment". And Endorsement 8, which was the exclusion of passenger liability clause, restated the point that the Policy did not cover the circumstance as in the 2nd limb to sub-s (1)(bb). It comes to this; if the plaintiff were "a passenger carried by reason of or in pursuance of a contract of employment", then the defendant would have to pay the judgment sum.

[13] It is not claimed that the plaintiff was an employee of the 1st JD, or that the 1st JD was the employer of the plaintiff. Nevertheless it is agreed that the plaintiff was a lawful passenger in the insured vehicle and on her way to make up the bride of the 2nd JD, that the 1st JD had "engaged" the plaintiff to make up the said bride and promised the plaintiff that she would be provided with transport to the bride's home and back to her home in

Seremban and would be paid RM100 for her trouble (incidentally, the plaintiff and JDs are all 1st cousins). The following authorities offer some guide on the passengers falling within the description "passenger carried by reason of or in pursuance of a contract of employment''.

[14] In *Union Insurance Malaysia Sdn Bhd v Chan You Young* (supra), the said policy contained provisions similar to the instant section 11-l(a) and endorsement 8. The facts were that the plaintiff, who was the wife of the owner of the insured vehicle, was injured whilst she was being driven by her son, who was an authorised driver, to her place of work. One of the two main issues before the Court of Appeal was whether the insurer was liable to satisfy the judgment.

[15] At p 522 of its judgment, the Court of Appeal related that it was the learned sessions court judge's view that the policy covered the insured and any authorised driver for any injury suffered by a third party travelling in the insured's vehicle subject to 2 exceptions, namely (i) that the insurer will not be liable for the loss of the third party if the third party was injured in the course of the employment of such person by the insured, or (ii) the third party was a member of the insured's household travelling in the said vehicle except that if that third party is being carried by reason of or in pursuance of a contract of employment. The Court of Appeal further related that it was the finding of the Sessions judge that the words "by reason of or in pursuance of a contract of employment" did not mean that the wife must be employed, and that in support of that finding the Session Court relied on *Izzard v Universal Insurance Co Ltd* (supra), and *Tan Keng Hong & Anor v New India Insurance Co Ltd* (supra).

[16] In *Izzard*, the said policy incorporated a previous proposal by the insured in which he had given a warranty or undertaking that passenger risk was not to be covered. The policy provided that the vehicle would be used only for general haulage and other trades, and that the insurer would indemnify the insured against liability in respect of "death of or bodily injury to any person caused by or arising out of the use of the vehicle ... Provided always that the company shall not be liable in respect of ... (b) death or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (c) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or ... such vehicle". The deceased Bernard George Izzard was employed by Industrial Builders who were engaged in building operations in Didcot and Coventry. Izzard lived near Didcot but agreed to work at Coventry upon terms, inter alia, that he would have a lorry at his disposal if he desired to go home to Didcot. He went home to Didcot every Saturday and returned every Monday. In that state of affairs he met his death while being carried back to Didcot on the insured vehicle. It was held by the House of Lords that the words "*a passenger carried by reason of or in pursuance of a contract of employment*" is not to be construed as applying only to the death of or injury to a person in the employment of the insured but also to any person being carried in applied to any person being carried in pursuance of a contract of employment with another employer:

A I cannot accept the respondent's contention that 'contract of employment' should be construed in the Act as subject to the implied limitation 'with the person insured by the policy' ... . I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons. But there is no sufficient ground for holding
B that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (i), though I am not prepared to say that might not be in certain events an employee of the assured who could claim as a passenger. But such cases are rare. The most probable is where the man killed or injured as on the vehicle in pursuance of a contract not with the owner of the vehicle but with someone else, for instance,
C with the person whose goods were being carried on the vehicle; thus a commercial vehicle carrying a contractor's or merchants' goods would frequently and perhaps normally have on it an employee of the goods owner to see to loading or unloading or delivering the goods or caring for them in transit. For these purposes such a man may be carried as a passenger" (Per Lord Wright at 782).

D **[17]** In *Tan Keng Hong & Anor v New India Insurance Co Ltd* (*supra*), in which the exceptions to the policy were similar to sub-s (1)(aa) and the instant section 11-l(a), the question in issue was whether the insurers were liable to indemnify the appellants, the driver and owner of a lorry, against whom judgment for damages in negligence had been given. The lorry was insured by the insurers under a third party policy which excepted liability for
E death or bodily injury caused to any person carried on the vehicle, other than to a passenger carried by reason of or in pursuance of a contract of employment. The deceased, a forester in the employment of the Forestry Department, had obtained a free lift on the lorry which overturned on the way to Seremban. It was held in the High Court that the insurers were not liable, and in *Tan Keng Hong v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156, the
F appeal to the Federal Court was dismissed. It was held by the Privy Council that the words "by reason of his contract of employment" must be read in conjunction with the words "in pursuance of", and, properly construed, mean "because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned".

G It does not mean that the passenger was being carried because the driver of the vehicle thought that by reason of the passenger's employment he might gain some business advantage by doing the passenger the favour of giving him a lift. The Privy Council also ruled that there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the second appellant's lorry and therefore the insurers were rightly held not to be liable under the policy (per Lord Salmon at 98).

H **[18]** Lord Salmon agreed that in the circumstances put forward by Lord Wright at p 782 that "the passenger would clearly be on the vehicle on reason of or in pursuance of his contract of employment". In his conclusion, Lord Salmon said:

I "In *McSteen v McCarthy* [1952] NI 33 the plaintiff was injured whilst travelling in his employer's lorry on his way home after his work was done. The employer was insured under a policy which, as in *Izzard*'s case, was identical with the one in the present case. The reason why an employer is rarely able to claim under his policy

of insurance in respect of injury sustained by anyone in his employ whilst being carried on one of his vehicles, is because the accident causing such an injury would usually arise out of and in the course of the passenger's employment; and the insurers would accordingly be protected by Exception (ii). In *McSteen*'s case, however, the plaintiff employee was injured whilst being driven home; and accordingly could not have been held to have been injured in the course of his employment; see *St Helen's Colliery Co Ltd v Hewitson* (1924) AC 59. Lord MacDermott CJ found that:

> … though the plaintiff was not obliged to travel back on his employer's lorry he was entitled to do so if he wished. As one would expect there was no formal agreement entered into about this, but the plaintiff, as the defendant must have known, lived in Belfast and ... it was understood between them when the plaintiff agreed to do this work ... that he would be allowed to travel back in the defendant's lorry when the job was finished ... . I am ... of opinion that the plaintiffs right to travel back on the lorry cannot be dissociated from his employment and that he was 'a passenger carried by reason of or in pursuance of a contract of employment' within the meaning of Exception [(Hi)]

These two authorities and all the others to which reference was made in argument make it plain that whether a passenger is carried by reason of or in pursuance of a contract of employment within the meaning of Exception (iii), depends solely upon the terms of the passenger's employment. In the present case, there is no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the second appellants' lorry. It is true that there was no prohibition in his contract of employment against asking for and accepting a lift in a timber lorry or, for that matter, in any other vehicle. The absence of such a prohibition cannot be seriously regarded as any evidence that he was being carried in the lorry by reason of his contract of employment within the meaning of those words in Exception (iii). Still less, in their Lordships' view, can the fact that the lorry driver gave him a lift because he thought that, by reason of the forester's employment, it might be good for business to do so."

[19] It was the opinion also of the Federal Court in *Tan Keng Hong v Fatimah binti Abdullah & ors* (supra), that sub-s (1)(aa) clearly excludes insurers from liability in respect of death of any person in the employment of the insured arising out of and in the course of such employment:

> On the authority of *Izzard v Universal Insurance Co Ltd* (1937) AC 773, a House of Lords' decision, which we respectfully follow, it is clear that the above provisions of the policy mean this, that —
>
> (1) the insurers will indemnify the second defendant and his servant against third party risks, but this is subject to the limits of liability stated in the policy;
>
> (2) in accordance with the limits of liability stated in the policy:
>
> (a) the insurers will not be liable to indemnify the defendants in respect of third party claims from persons in the employment of the second defendant whose death arose out of and in the course of that employment; and
>
> (b) the insurers will not be liable in respect of death of any person being carried in the lorry at the time of the accident;
>
> (3) but — and this is an important qualification — the insurers will be liable to indemnify the defendants in respect of the death of any passenger carried on the lorry by reason of or in pursuance of a contract of employment. This is clear from the words italicised in exception (iii) to section11.

In this case, the contract of employment cannot mean contract of employment with the second defendant, because exception (ii) clearly excludes the insurers from liability in respect of death of any person in the employment of the second defendant arising out of and in the course of such employment. So it is clear that the words in italics can only mean that the insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the second defendant and carried by reason of or in pursuance of a contract of employment.

From the above it is clear that the insurers are liable to indemnify the defendants if Ibrahim bin Kimpal was a passenger carried on the lorry by reason of or in pursuance of a contract of employment between him and his employer not being the second defendant.

On the authority of *Baker v Provident Accident and White Cross Insurance Co Ltd* (1939) 2 All ER 690, a decision of Cassels J we hold that a person is carried "by reason of a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that a person is carried "in pursuance of a contract of employment if it is a term of the contract that he shall be carried."

[20] To put together what has been said so far, the words "a passenger carried" by reason of or in pursuance of a contract of employment" applies to a person in the employment of the insured, or with another employer (*Izzard*). Other than in the rare case, a person in the employment of the insured would ordinarily fall within sub-s (1)(aa) (*Izzard*). The words "by reason of his contract of employment" must be read in conjunction with the words, "In pursuance of, and mean "because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned" (*Tan Keng Hong & Anor v New India Insurance Co Ltd*). Whether a passenger is carried by reason of or in pursuance of a contract of employment within the meaning of "a passenger carried by reason of or in pursuance of a contract of employment" depends solely upon the terms of the passenger's employment (*Tan Keng Hong & Anor v New India Insurance Co Ltd*). The insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the insured and carried by reason of or in pursuance of a contract of employment (*Tan Keng Hong v Fatimah binti Abdullah & Ors*). A person is carried "by reason of a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that a person is carried "in pursuance of a contract of employment if it is a term of the contract that he shall be carried." (*Tan Keng Hong v Fatimah binti Abdullah & ors; Baker v Provident Accident and White Cross Insurance Co Ltd* (1939) 2 All ER 690).

[21] That the passenger carried is an employee, to begin with, was also alluded to in the following cases. In *Vandyke v Fender & Anor* (*supra*), the facts were as follows. As an inducement to the plaintiff and the first defendant to take up employment at the second defendant's foundry, a car belonging to the second defendants was lent to the first defendant and weekly payments were made to him for petrol on the understanding that, if he used it to go to and from work, he would bring the plaintiff and two other

employees of the second defendants with him. The plaintiff and the first defendant took turns in driving and at the weekend the first defendant kept the car at his home and used it as he wished. Another car owned by the company secretary of the second defendants was later substituted, but the plaintiff and the first defendant were led to believe that this also belonged to the second defendants. While driving the plaintiff to work in the company secretary's car, the first defendant negligently collided with another car and the plaintiff was injured. The company secretary's car was insured for anyone driving with his permission for social, domestic and pleasure purposes, but not business purposes. The insurance company which provided cover for third party liability to the first defendant was in liquidation. The second defendants were insured by the third party under an employers' liability policy against injury to any person under a contract of service with the second defendants provided that the injury arose 'out of and in the course of such person's employment' with them'. At pp 340–341, Lord Denning MR and Karminski LJ held:

> The words injury "arising out of and in the course of his employment" were used in the old Workmen's Compensation Acts from 1897 to 1945. The selfsame words have been used in the Road Traffic Acts, 1930 and 1960. They have also been used in employers' liability policies. In my opinion they should receive the same interpretation in all three places: for they are all so closely connected that they ought, as a matter of common sense, to receive the same interpretation in each. The words were construed and applied in thousands of cases under the Workmen's Compensation Acts: and I think we should follow those cases. The two leading cases, most apposite for present purposes, are *St Helen's Colliery Co Ltd v Hewitson* (1924) AC 59; and *Weaver v Tredegar Iron & Coal Co Ltd* (1940) AC 955. They show, to my mind quite conclusively, that when a man is going to or coming from work, along a public road, as a passenger in a vehicle provided by his employer, he is not then in the course of his employment — unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in the vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment. That distinction must be maintained: for otherwise there would be no certainty in this branch of the law.
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> Seeing that the injury to the plaintiff did not 'arise out of and in the course of his employment', one would expect that it ought to be covered by the Road Traffic Acts. And such is, I believe, the case. The plaintiff was a passenger in this car. A private car is not usually compelled to be insured against liability to passengers. But it is so compelled if it is a vehicle in which passengers are carried 'by reason of or in pursuance of a contact of employment [1], see the proviso to s 203(4) of the Road Traffic Act 1960. Those words are much wider than the words 'in the course of his employment'. I think that passengers are carried in a vehicle 'by reason of a contract of employment whenever such a contract is the cause, or one of the causes, of their being carried.

[22] And at pp 342–343, Sachs and Karminski LJJ held:

> This issue of liability turns on the construction of the provisions of section 203 (4) of the Act. Was the car in the instant case "a vehicle in which passengers are carried ... by reason of ... a contract of employment"? If it was, the MIB, are potentially liable; if it was not, the MIB cannot be liable. Mr Tudor Evans

correctly submitted that on the authorities as they stand the plaintiff must establish, first, that the car was a "vehicle" within the meaning of the proviso; secondly, that it habitually carried passengers who came within the proviso; and thirdly, that the plaintiff was being carried "by reason of his employment." He rightly felt unable to argue that either the first or the second points should be decided in favour of the M.I.B. if the third was, contrary to his contentions, resolved in favour of the plaintiff.

As to the third point, it is, of course, obvious that the relevant phrase is not coterminous with "arising out of and in the course of his employment" as used earlier in section 203 (4). "By reason of his employment" embraces a wider category of employees. The essence of the test formulated in the speech of Lord Wright in *Izzard v. Universal Insurance Co Ltd.* (1937) AC 773, 782, was whether the passenger was being carried on the insured vehicle "for sufficient practical or business reasons." In that case an employee had (see p 778) arranged with his employers that he should be able after he had finished his work for the week to go home after working hours, if he so wished, in some vehicle which they would provide. An accident occurred when he was under that arrangement thus going home in a van owned and insured by a third party. It was held that he was being carried by reason of his employment though the van did not belong to his employer. In the instant case the plaintiff is in a markedly stronger position as regards being carried "by reason of his employment." It follows that the contention put forward on behalf of the M.I.B. fails and that they are under a potential liability.

[23] In *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 3 MLJ 429, the plaintiff was an employee of one Lim Yoke Pak ('Lim'). The plaintiff sustained severe personal injuries when the lorry in which he was travelling met with an accident. At the time of the accident, the plaintiff was being carried as a passenger in the said lorry pursuant to a contract of employment between him and the owner of the lorry, Lim. The lorry was covered by an insurance policy with third party risks issued by the appellant. The plaintiff obtained judgment against the driver of the lorry for damages, interest and costs and demanded payment of the judgment sum from the defendant who dented liability. Judgment was given for the plaintiff in the High Court and the defendant appealed. The then Supreme Court noted that injured person in *Vandyke* and *Tan Keng Hong* was not obliged to travel in the car provided. Gunn Chit Tuan SCJ (as he then was) held:

In our present case, the plaintiff was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle. He was therefore required by his contract of employment with his employer, the said Lim Yoke Pak, to travel on the lorry (vide the notes of evidence in pp 27 to 28 of the appeal records). In the circumstances of this case, we therefore consider that the learned judge was right in deciding that, upon a proper construction of the policy of insurance dated 19 May 1972, and ss 75(1) and 80(1) of the Ordinance, the defendant was liable to pay the plaintiff the amount due under the judgment dated 15 June 1978. We would therefore dismiss the appeal with costs.

[24] Likewise, in *Richard v Cox* (1942) 2 All ER 624 (the injured employee was driven by another employee), *Chan Kum Fook & Ors v The Welfare Insurance Co Ltd* [1975] 2 MLJ 184 (the injured employee was

driven by another employee, from the premises of their employer to their work site), *Allan Bernado Castillano & ors v Samuel Milan & Anor* [1999] 8 CLJ 11 (the injured employee was driven by another employee to their workplace), and, *China Insurance Co Ltd v Teh Lain Lee & Anor* [1977] 1 MLJ 1 (the injured employee was driven by the authorised driver acting in the course of his employment with their common employer), both the injured and driver were employees of the owner of the insured vehicle. Facts can be distinguished, but the common feature of all those passenger liability cases (*Lees v Motor Insurers Bureau* (1952) 2 All ER 51, where the injured employee was not in the insured vehicle driven by another employee, and *Baker v Provident Accident and White Cross Insurance Co Ltd* (1939) 2 All ER 690, where the injured employee was in another vehicle, are not strictly passenger liability cases) is that the injured was an employee and was being carried in the insured vehicle by reason of or in pursuance of his contract of employment.

[25] In *Union Insurance Malaysia Sdn Bhd v Chan You Young* (supra), the Court of Appeal held that "the authorised driver, the vehicle owner or the employer would have to be indemnified ... It did not really matter whether the passenger was in the employment of any of these three categories although in most of the authorities, the passenger was employed by the vehicle owner". In which category did the plaintiff belong? In their oral testimony to prove what later became agreed fact 1, the plaintiff admitted that was not an employee of the 1st JD, whilst the 1st JD admitted that she was not the employer of the Plaintiff. The defendant contended that the plaintiff was an independent contractor.

[26] "An independent contractor is one who is not bound generally to obey such orders as his employer may from time to time give, but is free to act as he thinks fit within the terms of his contract" (28 *Halsbury's Laws of England* 3rd edn at pp 22–23, and cited with approval in *Johor Granite Quarries Sdn Bhd & Anor v Seri Alam Properties Sdn Bhd* [1995] MLJU 353). "A 'contract of service' is to be distinguished from a 'contract for services'. An individual working under the latter arrangement is said to be an independent contractor. In the case of a 'contract of service', he is said to be an employee" (George Wei in *The Law of Copyright in Singapore* (2nd Ed) at paras 7.25 and 7.26, and cited with approval in *The Performing Right Society Ltd & anor v United Artists Singapore Theatres Pte Ltd* [2001] 2 SLR 375).

[27] Chua J, in *Teoh Gor Hua v Camel Plywood Corp Ltd* [1968] 2 MLJ 147; [1965–1968] 1 SLR 782, collated the following authorities:

> It is convenient now to consider the test to be applied in deciding whether a man be a servant or an independent contractor.
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> The word 'servant' is defined in *Salmond on Torts* (14th Ed) p 648 as 'any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done.' In 25 *Halsbury's* (3rd Ed) p 447, the characteristics of the relationship of master and servant are stated thus:

> Whether or not, in any given case the relationship of master and servant exists is a question of fact; but in general the relationship imports the existence of power in the employer not only to direct what work the servant is to do^but also the manner in which the work is to be done.

At p 498 of the same volume of *Halsbury's* the following passage appears:

> To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work.

The following passage in *Smith's Master & Servant* (8th Ed) p 254, is useful:

> But though it is the employer's power of control that differentiates the position of servant from that of independent contractor, the employer may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor has agreed to carry out for him, of deciding as to the quality of materials and workmanship, of stopping the works or any part thereof at any stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he will not thereby of necessity render himself liable to third persons for the negligence of the contractor in carrying out the work.

McCardie J in *Performing Right Society v Mitchell & Booker* (1924) 1 KB 762 said (at p 767):

> It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant.

In *Honeywill & Stein Ltd v Larkin Bros* (1934) 1 KB 191 Slesser LJ who delivered the judgment of the Court of Appeal, said (at p 169):

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."

[28] Gill J (as he then was) in *Bata Shoe (Malaya) v Employees' Provident Fund Board* [1967] 1 MLJ 120, put it as follows:

> A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive. (See *Halsbury's*, 3rd ed, vol 25, p 448, para 872).
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> In *Short v J and W Henderson Ltd* (1946) 174 LT 417, 427, Lord Thankerton recapitulated with approval the four *indicia* of a contract of service derived by Lord Justice Clerk in *Park v Wilsons and Clyde Coal Co Ltd* (1928) SC 121, 134 from the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal. Lord Justice Clerk had gone on to say that a contract of ser-

vice may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

It is to be observed that the relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. To distinguish between an independent contractor and a servant, the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. In *Stevenson Jordan & Harrison Ltd v MacDonald & Evans* (1952) 1 TLR 101, 111 Denning LJ said:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[29] According to the learned authors of *Munkman on Employer's Liability* 12th ed at 67, "the employment relationship has become a cluster concept with the courts giving weight to numerous factors, incapable of being exhaustively listed and none of which is alone decisive". Even so, it remains that an employee is someone who works under a contract of service. It is not every one who renders service who is a servant. "A cab-driver is not the servant of his fare, though he renders him service, and in *Jones v Liverpool Corporation* (1885) 14 QBD 890 the driver of a water-cart who was hired by a corporation to water the streets and what told what streets to water was held not to be the servant of the corporation" (see *Simmons v Health Laundry* (1910) 1 KB 543, 545 per Simon KG and Shakespeare for the Respondents). " ... it would, I think, be absurd to hold that a skilled music master who gives lessons to a pupil, either in his own house or in the pupil's house, to be regarded as the workman and the pupil as the employer" (*Simmons v Health Laundry* at 548 per Cozens-Hardy MR). "It is to my mind equally clear that where a person goes to a music or singing teacher to take lessons it would absurd to hold that the person giving the lessons is the servant of the person taking them in any sense of the word. The contract between them is a contract for services, but it is not a contract of service" S*immons v Health Laundry* at p 549 per Fletcher Moulton LJ).

[30] A service was agreed to be rendered in the instant case. But nothing pointed to an employer/employee relationship in any sense of the word. The plaintiff was employed, but it was only in the sense of "engaged". That contract between the beautician (Plaintiff) and teacher (1st JD) was a contract for service, not unlike a contract for service between lawyer and client. It could not have been anything but a contract for service. On the facts, the plaintiff was plainly an independent contractor. The plaintiff was

A self-employed. The plaintiff was not carried in the vehicle by reason of or in pursuance of a contract of employment. The plaintiff was not anyone's employee, and she could not have been carried by reason of or in pursuance of a contract of employment. Accordingly, the plaintiff's claim is dismissed with costs.

B *Plaintiff's claim dismissed with costs.*

Reported by I.Izzuddin

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